COAL ENERGY, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 88-93 Decided December 7, 1989

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying application for review of failure to abate cessation order. NX 6-7-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally--Surface Mining Control and Reclamation Act of 1977: Bonds: Generally--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Generally

   Where a notice of violation has properly been issued citing an operator for failure to post an acceptable performance bond, and no acceptable bond is tendered within the maximum 90-day abatement period allowed to be afforded to the permittee to abate the violation pursuant to 30 CFR 843.12(c), OSMRE properly issues a cessation order for failure to abate a violation.

APPEARANCES: James Lowe, President, Coal Energy, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Coal Energy, Inc. (Coal Energy), has appealed from a decision of Administrative Law Judge Joseph E. McGuire, dated October 20, 1987, deny- ing its application for review of failure-to-abate cessation order (CO) No. 85-92-082-002, which was issued by the Office of Surface Mining Recla- mation and Enforcement (OSMRE) with respect to Coal Energy's operation of the Area No. 5 surface coal mine in Cumberland County, Tennessee, under State permit No. 2183085.

The facts are not substantially in dispute. This case began, follow- ing the adoption of a Federal permanent program in the State of Tennessee effective October 1, 1984, with the issuance by OSMRE Reclamation Special- ist Samuel E. Hollaway of notice of violation (NOV) No. 85-92-081-003 on July 10, 1985. In that NOV, Coal Energy was cited with having failed to post an acceptable performance bond in violation of 30 CFR 942.800(b)(3) and was directed to submit a bond "in the required amount, and in a form acceptable to [OSMRE]" by July 24, 1985 (Exh. R-2 at 2). 1/

Coal Energy had a performance bond with the Union Indemnity Insurance Company of New York (Union) as the surety. However, OSMRE had notified Coal Energy by letter dated February 25, 1985, that this bond was not acceptable and that a new bond should be submitted within 30 days of receipt of the letter. OSMRE reiterated this requirement in a June 3, 1985, letter, calling for submission of a new bond within 15 days and advising Coal Energy that its failure to do so would result in issuance of an NOV and a CO, if necessary. No bond was posted, and the NOV was issued.

On July 22, 1985, Coal Energy filed an application for review of and temporary relief from NOV No. 85-92-081-003. The case was docketed by the Hearings Division as NX 5-119-R.

During the pendency of this application for review, OSMRE extended the time for abatement to August 23, 1985, and again to September 23, 1985, "due to operator having to change surety company since their present com- pany is not accepted by the U.S. Treasury as an [insurer] of reclamation bonds" (Exhs. R-3 and R-4). By letter received by OSMRE on September 18, 1985, Coal Energy requested a further extension of time. Coal Energy did not specify the length of the extension sought, but stated: "We understand that [the time for abatement cannot] be extended any longer than 90 days from the people here at the Knoxville or Chattanooga office and that you could give us some help. * * * If there is anything that you could do to help us it would be greatly appreciated" (Exh. R-5). Coal Energy stated that it sought the extension because it was "finding it very hard to find a company that wants or will write a bond for the State of Tennessee." Id.

In a September 24, 1985, letter, OSMRE interpreted Coal Energy's September 1985 letter as a request for an extension of the time for abatement beyond the maximum 90-day period for abatement allowed by 30 CFR 843.12(c) and denied the request:

> Our regulation 30 CFR 842.12(f) does allow extensions of abate- ment dates under certain circumstances which are specified in

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1/ Under 30 CFR 942.800(b)(3), holders of permanent program permits in Tennessee were required either to post an acceptable new bond or provide an executed assignment of the required acceptable bond "[n]ot later than 30 days after the effective date of [the Federal] program." The effective date of the Federal program in Tennessee was Oct. 1, 1984. See 49 FR 38874 (Oct. 1, 1984).

> the regulation. However, your situation concerning bond replacement does not fit into any of the specified circumstances. In addition, we believe you have had sufficient notice of the situation in order to resolve the problem.

(Exh. R-6). 2/

On October 18, 1985, OSMRE inspector Loise P. Oswalt issued CO No. 85-92-082-002 to Coal Energy for failing to timely abate the violation cited in NOV No. 85-92-081-003. On October 25, 1985, Coal Energy filed an application for review of the CO. This case was docketed by the Hearings Division as NX 6-7-R.

It should be noted that on October 11, 1985, (18 days after the September 23, 1985, deadline imposed by OSMRE and 3 days after the end of the maximum time allowable for compliance) Coal Energy did tender as a "collateral bond" documents offering certain land as collateral for the performance of its obligations under the surface mining law. Posting of such "collateral bond" is allowable. See 30 CFR 800.5(b) and 800.12. However, there were problems with the form of the collateral bond, and, several days after it was filed, OSMRE notified Coal Energy that it was refusing to accept the documents because it did not regard the documents as sufficient to constitute an acceptable bond. See Tr. 18; Exh. R-7. The record indicates that, on October 23, 1985, Coal Energy submitted a collateral bond acceptable to OSMRE and the NOV and CO were then terminated.

Meanwhile, a hearing was held before Judge McGuire in case number NX 5-119-R on November 7, 1985, in Knoxville, Tennessee, addressing the propriety of OSMRE's issuance of the NOV. By decision dated December 23, 1985, Judge McGuire denied Coal Energy's application for review of and temporary relief from the NOV, based on his conclusion that OSMRE had properly issued the NOV. Coal Energy appealed this decision to this Board, which docketed the appeal as IBLA 86-242.

During the pendency of the Board's consideration of Judge McGuire's December 1985 decision, administrative review proceedings in case number NX 6-7-R continued before Judge McGuire. A hearing was held on June 1, 1987, in Knoxville, Tennessee, at which Coal Energy and OSMRE were represented. Following the hearing, Judge McGuire issued his October 1987 deci-sion denying Coal Energy's application for review of the CO based on his

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2/ OSMRE's letter of Sept. 24, 1985, did not expressly extend the time for abatement to the maximum 90 days, that is, until Oct. 8, 1985. Thus, Judge McGuire held that OSMRE had only extended the time for abatement to Sept. 23, 1985. OSMRE's Sept. 24, 1985 letter, denying appellant's request for an extension beyond 90 days, but referring to the 90-day maximum, might be regarded as implicitly modifying the NOV to afford appellant the full 90-day extension. However, it is unnecessary to resolve this question, because (as discussed below), Coal Energy did not abate timely in either case.

conclusion that OSMRE had "properly issued [the] CO * * * because [Coal Energy] had failed to abate the violation in the underlying NOV within the time originally fixed or that date to which the abatement had been subsequently extended" (Decision at 4). Coal Energy then filed the present appeal with this Board, which docketed it as IBLA 88-93.

Finally, in Coal Energy, Inc. v. OSMRE, 104 IBLA 24 (1988), we affirmed Judge McGuire's December 1985 decision on August 19, 1988, con- cerning the NOV, holding that: "Where the evidence is uncontroverted, as it is here, that [Coal Energy] did not post an acceptable new bond within 30 days of the October 1, 1984, effective date of the federal program, an NOV issued for failure to comply with 30 CFR 942.800(b)(3) must be upheld." Id. at 26.

In its statement of reasons for appeal, appellant contends that the CO "should not have been written," asking "why should the coal operators * * * pay for the inexperience of the lawyers for [OSMRE?]" In support of this contention, appellant submits the November 18, 1987, affidavit of Gail Ray, appellant's former bookkeeper. In that affidavit, Ray explains that appellant submitted the collateral bond and other documents on October 11, 1985, and was informed by an OSMRE employee that "everything was ok," only to learn seven days later that the bond was "still not acceptable." She states that when she asked why it had taken seven days she was informed "that this was the first time that they had gotten real estate placed for a bond and the attorneys [were] not sure what they needed."

[1] It is undisputed that appellant failed to abate the violation cited in NOV No. 85-92-081-003 either before the September 23, 1985, deadline imposed by OSMRE or within 90 days of issuance of the NOV, which was the maximum time allowable for compliance. The expiration of the 90-day period was October 8, 1985, and appellant was well aware of this dead-line. 3/ However, no bond was filed with OSMRE on or before that date. 4/

3/ That Oct. 8, 1985, was the last day for abating the violation cited in the NOV was recognized by appellant, as evidenced by a notation on page 15 of Exhibit A-3, which is a copy of a calendar page for October 1985, pre- sumably that of James Lowe, president of Coal Energy. The notation, which is placed in the square for Oct. 8, reads: "[L]ast day of extension for time on bond for #5."

4/ At the hearing, James Lowe, appellant's president, initially testi- fied that he might have submitted documents offering real property as collateral to OSMRE prior to the expiration of the 90-day period (Tr. 36, 39-40). This is directly contrary to the testimony of the OSMRE employee (Tr. 20, 32). Moreover, Exhibit R-7, which constitutes the collateral bond and other documents submitted by appellant, including deeds of trust with respect to two pieces of property in Roane and Overton Counties, Tennessee, contains a cover page which states that these documents were received by OSMRE on Oct. 11, 1985, and the document is signed by the OSMRE employee and dated Oct. 11, 1985. Further, a memo of a telephone conversation on Oct. 18, 1985, between Lowe and OSMRE, placed into evidence by appellant,

The earliest filing of any documents which could arguably be construed as a bond was October 11, 1985, 3 days after the expiration of the 90-day period, when the collateral bond was tendered.

Where a permittee fails to abate a violation within the time set for abatement, OSMRE is required by section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (1982), and 30 CFR 843.12(d)(1) 5/ to issue a CO. See also 30 CFR 843.11(b)(1). OSMRE is permitted by 30 CFR 843.12(c) to extend the initial time for abatement, but the regulation provides that, except where it is not feasible to abate a violation due to certain circumstances, "[t]he total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance." 30 CFR 843.12(c); see also 30 U.S.C. § 1271(a)(3) (1982).

While OSMRE is authorized under 30 CFR 843.12(h), at the request of a permittee, to grant extensions of the time for abatement of a violation cited in an NOV beyond 90 days in those circumstances outlined in 30 CFR 843.12(f), none of those circumstances applies here. The reason given by appellant in its September 1985 letter for its failure to abate the violation cited in the NOV was that it was "finding it very hard to find a company that wants or will write a bond for the State of Tennessee" (Exh. R-5). That does not constitute one of the circumstances which might "qualify a surface coal mining operation for an abatement period of more than 90 days." 30 CFR 843.12(f). 6/

In the present case, OSMRE construed Coal Energy's September 1985 letter as a request for an extension of the abatement period beyond 90 days and denied the request because none of the circumstances speci- fied in 30 CFR 843.12(f) existed. We regard this as the proper approach and conclude that OSMRE properly denied the request. See Grays Knob Coal Co. v. OSMRE, 98 IBLA 171, 174 (1987). 7/

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fn. 4 (continued)
refers to papers "delivered last Friday," which would have been Oct. 11, 1985 (Exh. A-2 at 1). Further, under cross-examination by counsel for
OSMRE, Lowe acknowledged that Oct. 11, 1985, was the date of appellant's submission (Tr. 43-44, 46).

5/ That regulation provides that "[i]f the permittee fails to meet the time set for abatement the authorized representative shall issue a cessa- tion order." 30 CFR 843.12(d)(1) (emphasis added). The regulation was made applicable in the State of Tennessee by 30 CFR 942.843.

6/ These enumerated circumstances encompass only those situations where the permittee cannot abate a violation because of bureaucratic delays in the renewal of a permit or approval of designs or plans; because a judicial order, labor strike, or climatic condition precludes abatement; or because abatement would violate certain safety standards.

7/ We note in any event that OSMRE's September 1985 letter denying appel- lant's request for extension was subject to appeal to the Board. See 30 CFR 843.12(i); 43 CFR 4.1281. No appeal was taken. In the absence of a timely appeal, the question of the propriety of OSMRE's denial of

In the absence of an extension of the time for abatement beyond the 90-day period mandated by 30 CFR 843.12(c), we conclude that OSMRE pro-perly issued the failure-to-abate CO, because appellant failed to submit any bond before the expiration of the maximum 90-day compliance period allowable by law, and, thus, failed to timely abate the violation. In these circumstances, a CO must be issued. Pineville Properties Corp. v. OSMRE, 104 IBLA 258, 264 (1988); L. W. Overly Coal Co. v. OSMRE, 103 IBLA 356, 359-60 (1988); B & J Excavating Co. v. OSMRE, 89 IBLA 129, 135 (1985). Thus, we hereby affirm Judge McGuire's October 1987 decision denying appel-lant's application for review of the CO.

We appreciate that appellant found it difficult to secure an accept- able bond, but it effectively received almost a year to submit such a bond or arrange an alternative. Had it tendered a collateral bond within a reasonable time following issuance of the NOV, during which OSMRE could have reviewed the submission for adequacy, the CO would likely never have been issued. When Coal Energy failed to submit the required bond within the 90-day period, OSMRE had no choice but to issue the failure-to-abate CO.

Appellant contends that it should not be penalized for OSMRE's failure to determine more promptly the adequacy of appellant's October 11, 1985, submission of a collateral bond and other documents. As noted above, regardless of how OSMRE handled these documents, a CO would still have been properly issued, since they were not timely tendered. Thus, we need not consider whether OSMRE improperly delayed handling the proffered collateral bond (a matter that is in substantial dispute), or what effect any unreasonable delay might have. 8/

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fn. 7 (continued)
appellant's request for an extension beyond the 90-day period is final. See Turner Brothers, Inc. v. OSMRE, 102 IBLA 111, 121-22 (1988); Inexco Oil Co., 93 IBLA 351, 353 (1986); Elsie V. Farington, 9 IBLA 191, 194 (1973).

8/ The record indicates that OSMRE did not initially consider the Oct. 11, 1985, submission as acceptable, but merely received the submission for pur
poses of further review (Tr. 28-29). Thus, it is not clear that appellant's assertion that OSMRE then regarded the submission as "ok" is accurate.

We note that Judge McGuire, in his October 1987 decision, at page 3, expressly held that OSMRE properly determined the collateral bond and associated documents submitted on Oct. 11, 1985, to be unacceptable, and, thus, concluded that the documents would not have abated the violation even if submitted on or before the expiration of the 90-day period.

The question of whether the collateral bond was "adequate" as tendered on Oct. 11, 1985, might bear on the amount of any civil penalty assessed against Coal Energy for the CO, since the penalty for a CO is determined based on the number of days between issuance of the CO and abatement. The question of the amount of the civil penalty, however, is not before us.

We perceive no need to consider the adequacy of the Oct. 11, 1985,
submission or to determine whether it was properly handled by OSMRE in the context of the instant application for review.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge